Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

CHARLES F. LAMBETH, JR., AND MICHAEL D. LEA,

Petitioners,

v.

THE BOARD OF COMMISSIONERS OF DAVIDSON COUNTY, NORTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For religious reasons, respondent recently installed "In God We Trust" prominently over the main entrance to its seat of government. The United States Court of Appeals for the Fourth Circuit held that a complaint challenging this action as violative of the Establishment Clause failed to state a claim because (1) the complaint did not allege that the governmental action was "entirely motivated by a purpose to advance religion" and thus did not satisfy the first prong of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971), and (2) the endorsement test of *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 120 S. Ct. 2266 (2000), was only an enhancement of the second *Lemon* prong and did not apply to the determination of secular purpose under the first prong. Subsequently this Court held in *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. ___, 125 S. Ct. 2722 (2005), contrary to each of the holdings of the Fourth Circuit, that (1) an "ostensible and predominant purpose of advancing religion" sufficed to state a claim of Establishment Clause violation, and (2) the endorsement test applied to the determination of secular purpose. The question presented is:

Should the court of appeals' decision be vacated and remanded in light of the directly conflicting holdings in *McCreary County*?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	v
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provision Involved	1
Statement of the Case	2
Reasons for Granting the Petition	5
Conclusion	9

TABLE OF CITED AUTHORITIES

Page

Cases:

Edwards v. Aquillard,
482 U.S. 578 (1987) 6

Hishon v. King and Spalding,
467 U.S. 69, 104 S. Ct. 2229 (1984) 8

Lemon v. Kurtzman,
403 U.S. 602, 91 S. Ct. 2105 (1971) ..... i, 3, 4, 6

McCreary County, Kentucky
v. American Civil Liberties Union of Kentucky,
545 U.S. ___, 125 S. Ct. 2722 (2005) ..... *passim*

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290, 120 S. Ct. 2266 (2000) ..... i, 3, 7

Wallace v. Jaffree,
472 U.S. 38 (1985) 4, 6

Cited Authorities

Page

Statutes:

28 U.S.C. 1254(1) 1

28 U.S.C. 1331 2

28 U.S.C. 1343 2

42 U.S.C. 1983 2

Constitutional Provisions:

U.S. Const., amend I 1

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fourth Circuit Decided May 13, 2005 ..... 1a

Appendix B — Order And Judgment And Memorandum Opinion Of The United States District Court For The Middle District Of North Carolina Filed May 25, 2004 ..... 16a

Appendix C — First Amended Complaint Of The United States District Court For The Middle District Of North Carolina, Salisbury Division Filed September 15, 2003 ..... 57a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, to vacate that judgment, and to remand the case for further consideration in light of this Court's supervening decision in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. ___, 125 S. Ct. 2722 (2005).

OPINIONS BELOW

The District Court opinion (per Osteen, D.J.), granting respondents' motion to dismiss for failure to state a claim (Appendix ("Pet. App.") 18a), is published at 321 F. Supp. 2d 688 (M.D.N.C. 2004). The Fourth Circuit opinion (per King, J., joined by Widener, J. and Henry F. Floyd, D.J.), affirming (Pet. App. 1a), is published at 407 F.3d 266 (4th Cir. 2005).

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on May 13, 2005. No petition for rehearing or rehearing *en banc* was filed. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., amend. I: "Congress shall make no law respecting an establishment of religion . . .".

STATEMENT OF THE CASE

Petitioners, attorneys who live and practice in Davidson County, North Carolina, brought this action pursuant to 42 U.S.C. § 1983 on June 24, 2003. The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. Petitioners claimed that the installation six months earlier of the words "In God We Trust"[1] in 18 inch letters over the main entrance to the new Davidson County Governmental Center, the seat of government of Davidson County, North Carolina, was a violation of the Establishment Clause of the First Amendment to the United States Constitution. Pet. App. 58a-3(a)-(g). These words were more prominently displayed than the name of the building, which was the only other writing on the front façade. Pet. App. 59a(i)-(l).

Petitioners alleged that respondent "intended [to] affix a prominent religious message" to its seat of government, Pet. App. 58a(r); that, at the meeting authorizing the display, the religious nature of the words was repeatedly emphasized by members of the public and by some of the Commissioners who voted in favor of the installation, Pet. App. 60a(u),(v); that one of the Commissioners who voted in favor said that a nay vote "would be perceived as a vote against God," Pet. App. 60a(y); and that the fact that "In God We Trust" is the national motto was "mentioned but not emphasized" at the meeting, Pet. App. 60a(w).

Petitioners further alleged that "In God We Trust" as and where installed conveyed a religious message to almost all who saw it, Pet. App. 59a(p); that its location indicated that it was a message from the government, Pet. App. 59a(s); that

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1. As installed these words were not in quotation marks.

the words were not identified as the national motto either inside or outside the building, Pet. App. 59a(m),(n); that no contrary or impeaching message would be allowed, Pet. App. 60a(aa)-61a(c); and that a reasonable observer would perceive the display to be an endorsement of religion, Pet. App. 61a(ff).

The United States District Court for the Middle District of North Carolina dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6).[2] Pet. App. 16a, 17a. The United States Court of Appeals for the Fourth Circuit affirmed. Pet. App. 1a.

The court of appeals first held that the tests of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971), were controlling, Pet. App. 4a-5a, and that the "endorsement test" of *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 120 S. Ct. 2266 (2000) was only an enhancement of *Lemon* and only to be used in applying the second *Lemon* test. Pet. App. 5a. It then held that in order to state a claim under the first *Lemon* test the complaint must allege that respondent's action

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2. The dismissal was of the First Amended Complaint. Respondent had moved to dismiss the initial complaint pursuant to Fed. R. Civ. P. 12(b)(6). Petitioners amended as of right pursuant to Fed. R. Civ. P. 15(a). Respondent renewed its motion to dismiss. An amicus was allowed to move to dismiss for lack of standing. Petitioners then moved for leave to file a second amended complaint, enlarging their allegations as to standing. Pet. App. 19a. In its memorandum opinion the district court found that the First Amended Complaint sufficiently alleged standing and therefore denied petitioners' motion to amend as futile. Pet. App. 16a, 19a-27a. It then granted respondent's motion to dismiss the First Amended Complaint for failure to state a claim. Pet. App. 17a, 27a-56a. Respondent did not appeal as to standing. Amicus did not participate in the appeal.

was "entirely motivated" by a religious purpose, Pet. App. 7a, *quoting Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). It then reasoned that this requirement had not been met here because "the Complaint fails to allege that [respondent's] discussion of the phrase 'In God We Trust' as the national motto was a pretext for its religious motivation, and thereby fails to allege that there was no legitimate secular purpose to [respondent's] approval of the display." Pet. App. 7a-8a. That is, since petitioner had alleged that respondent had *discussed* that "In God We Trust" was the national motto, petitioner had thereby alleged that respondent had a secular purpose for its action; and since petitioner had not further alleged that this secular purpose was pretextual, perforce petitioner had not alleged that respondent was "entirely motivated" by a religious purpose. Once any secular purpose was alleged and then not also alleged to be pretextual, the first prong of *Lemon* had been satisfied, without respondent having to plead. Pet. App. 8a and n.2.[3]

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3. The First Amended Complaint had alleged that the fact that "In God We Trust" is the national motto had been "mentioned but not emphasized," *i.e.*, "discussed" during the enactment meeting, but did not allege by whom this was done, whether by respondent or by a member of the audience. Pet. App. 21a(w). The district court nevertheless stated that "[petitioners] concede that [respondent] discussed the fact that 'In God We Trust' was the national motto before approving its display . . . ," and that "this concession bespeaks [respondent's] secular purpose of acknowledging the official national motto." Pet. App. 60a. On appeal petitioners pointed out that the district court had misconstrued their allegation. "[Petitioners'] allegation does not say who mentioned the national motto, nor when in the course of the meeting this was said. It does not say how this information was received. It does not say that any Commissioner [of respondent] acted on this information or had it as a purpose." Petitioner's Reply Brief, at 15. The court of appeals nevertheless construed the allegation as being that *respondent* had discussed the matter. Pet. App. 7a-8a and n.2.

Having held that petitioner had not alleged that respondent was entirely motivated by religious purposes, the court of appeals accordingly did not evaluate the allegations that respondent intended to affix a prominent religious message to its seat of government, that the religious nature of the display was emphasized at the enactment meeting, and that one Commissioner opined that a vote against the display would be seen as a vote against God. And, having held that the endorsement test did not apply to the assessment of secular purpose, it also did not evaluate the allegations that as and where installed the display conveyed a religious message to almost all who saw it, that the words were not identified as the national motto either inside or outside the building, and that no contrary or impeaching message would be allowed.

REASONS FOR GRANTING THE WRIT

This case is controlled by *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. ___, 125 S. Ct. 2722 (2005).[4] Both this case and *McCreary County* involve governmental displays of religious creeds.

The circuit court acknowledged that the display of "In God We Trust" on a main county building, unidentified as the national motto, was "governmental action which goes beyond the traditional uses of the phrase." Pet. App. 10a. Petitioners alleged that it "convey[ed] a religious message to almost all readers." Pet. App. 59a(p). "In God We Trust" is the national motto but it is also a religious creed, a statement of communal religious belief. It is as or more religious than, for example, the opening of the Apostles'

4. *McCreary County* was handed down after the time for petitioning for rehearing or rehearing *en banc* had expired.

Creed ("I believe in God . . ."). The exact origin of the phrase is not known, but it calls to mind the words of the Prophet Job who, despite all the plagues (and comforters) that God visited on him, never wavered in his trust in God. "Though he slay me, yet will I trust in him." Job 13:15 (King James Version).

McCreary County would control even if "In God We Trust" were taken to be an entirely patriotic or historical statement, because a religious purpose can exist in the absence of a religious statement. The Alabama moment-of-silence law was not a religious statement, but it was held unconstitutional because the motive for its enactment was religious. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

The ruling below is twice inconsistent with *McCreary County*.

First, *McCreary County* ruled that the first prong of *Lemon* requires only an "ostensible and predominant purpose of advancing religion," 545 U.S. ___, 125 S. Ct. at 2735, not an entirely religious purpose. A "primary" or a "preeminent" purpose to advance religion is sufficient to state a claim. 545 U.S. ___, 125 S. Ct. at 2735, *quoting Edwards v. Aguillard*, 482 U.S. 578, 594 (1987); *Id.*, n.13.[5] The court of appeals held, to the contrary, that the purpose had to be entirely religious for the test to be violated. ("[W]e will deem the first prong of the *Lemon* test to be contravened only if the action is entirely motivated by a purpose to advance religion.") Pet. App. 7a (quotation marks and brackets and citations omitted).

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5. This Court specifically discussed *Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2479 (1985), on which the court of appeals had relied for its entirely-motivated-by-religion rule, Pet. App. 7a, and decided that it did not so hold. 545 U.S. ___, 125 S. Ct. at 2736.